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JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 626

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals is reported at 227 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955, and a petition for rehearing was denied on November 17, 1955. By order of Chief Justice Warren, the time for filing a petition for a writ of certiorari was extended to January 6, 1956, and by subsequent order of Mr. Justice Clark the time for such filing was extended to and including January 16, 1956. The

petition was filed on January 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the "membership" clause of the Smith Act (18 U. S. C. 2385) is unconstitutional on its face or as applied to the facts of this case.

2. Whether Section 4 (f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f))—which provides in part that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that or any other criminal statute—modified, amended, or repealed the "membership" clause of the Smith Act so as to render it inapplicable to this case.

3. Whether the evidence was sufficient to support the verdict.

4. Whether petitioner was given a fair trial with respect to the composition of the grand jury, alleged bias of the petit jury, production of statements given by Government witnesses before trial, and the examination of certain Government witnesses.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954 (50 U. S. C. 841), and pertinent statutes concerning the qualifications and empanelling of

jurors (28 U. S. C. 1861, 1864), are set forth in the Appendix to the petition (pp. 46–51).

STATEMENT

The indictment charged that from about January 1946 and continuously thereafter up to and including the date of its filing on November 18, 1954, the Communist Party of the United States was at all times a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit; that throughout that entire period of time the petitioner was a member of said Communist Party with knowledge that it did so teach and advocate; and that he intended to bring about such overthrow of the Government as speedily as circumstances would permit. After a jury trial before Judge Bryan, sitting by special designation, petitioner was convicted.

Petitioner's membership in the Communist Party within the specified period was conceded at the time of trial (Tr. 1452),[1] and his petition acknowledges that he is publicly known as Chairman of the Communist Party of North Carolina (Pet. 4).

The Government's evidence consisted of testimony from three former members of the Communist Party, together with documentary evi-

[1] "Tr." refers to the typewritten trial transcript.

dence reflecting the aims and purposes of the Party. In proof of the revolutionary context of the Marxist-Leninist program readopted by the Communist Party at its 1945 convention (Tr. 340–42), evidence was presented through the testimony of the witness Lautner [2] who authenticated the basic Marxist-Leninist texts used by the Party in promulgating its program (Ex. 1, 5–15).[3] Lautner testified as to what he was taught at the Party's highest National Training Schools in 1930 and 1941 (Tr. 287, 319); what he as a high ranking official of the Party taught at supervised classes in 1946, 1947, 1948 and 1949 (Tr. 352, 356, 357); and what texts were used at Party schools

[2] Until his defection from the Party in 1950, Lautner had been a high-ranking Party functionary. He attended the National Training School of the Party in 1930 and 1941 (Tr. 287, 334); was a District Organizer in West Virginia from 1936 to 1940 (Tr. 310); taught Party classes from 1946 to 1948 (Tr. 330); was a member of the National Review Commission in 1948; and from 1947 to 1950 headed the New York State Review Commission (Tr. 312).

[3] Not only did Lautner's testimony establish that such Marxist-Leninist classics set forth the revolutionary program of the Communist Party, but the testimony of the other two witnesses demonstrated the petitioner's knowledge and use of the following Marxist-Leninist texts in furtherance of the Party's objectives: *Communist Manifesto* (Ex. 1, Tr. 664, 1057); *Foundations of Leninism* (Ex. 5, Tr. 623, 1058); *Problems of Leninism* (Ex. 6, Tr. 1034); *State and Revolution* (Ex. 7, Tr. 576, 1055, 1058); *Left Wing Communism* (Ex. 8, Tr. 1017, 1020, 1058, 1127); *What Is To Be Done?* (Ex. 9, Tr. 1055, 1127); *Imperialism* (Ex. 10, Tr. 1055, 1057); *History of the Communist Party of the Soviet Union (Bolshevik)* (Ex. 12, Tr. 665, 1058); *Strategy and Tactics of the Proletarian Revolution* (Ex. 13, Tr. 1021).

and circulated by the Party generally (Tr. 290, 302, 320–322, 336, 352, 355, 356).

On the issue of whether the Communist Party, throughout the period alleged in the indictment, taught and advocated the violent overthrow of the Government, the testimony of Lautner—coupled with the testimony of Clontz and Childs and the documentary evidence—was very similar to and in some respect identical with that received in other Smith Act cases, such as *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2), affirmed, 341 U. S. 494; *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922; and *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.

Petitioner's close relationship to the Party was developed at the trial. He was not just a mere member. Throughout the entire indictment period, he was Chairman of the North and South Carolina District of the Communist Party (Tr. 573, 602, 1137); he maintained close contact with National Party headquarters in New York (Tr. 591, 690, 1070, 1113); he organized meetings at which high Party functionaries spoke (Tr. 585–588, 613, 617); he directed a Party school which was established to train outstanding Communists in the Virginia and North and South Carolina Districts (Tr. 1073).

Since the Communist Party is a rigidly disciplined organization, organizing itself on the principles of democratic centralism (Tr. 404), peti-

tioner could not have received or retained his position as Chairman of a Communist Party district if he disagreed with or acted in ignorance of the Party's basic objectives. Moreover, specific evidence established that petitioner not only was aware of but earnestly and actively supported the Party's teachings, particularly its program of force and violence (Tr. 599–600, 604, 606, 617, 619, 635, 644–647, 1134.)

Witness Clontz[4] testified that on one occasion he posed to the petitioner the question of why Communism cannot be brought to the United States by educating the people, by showing them that this is the best form of government (Tr. 574). Petitioner replied that such a concept was entirely fallacious, since the United States Government owned all the means of communication, as well as the schools, and would not permit the masses of the people to learn the truth about Communism. Petitioner stated that "in order to get the truth to the people you first have to destroy the Government * * * that Stalin and his followers had proved conclusively that ideas alone would never change the form of Government or would never do anything[5] * * * force is the only answer"

[4] Clontz was a confidential informant who, in 1948, infiltrated the Communist Party in North Carolina with the knowledge of the FBI. In the Fall of 1948, he made contact with the Party by writing to petitioner and expressing an interest in the Communist Party. Until he ceased his Communist Party activities in early 1952, he remained in constant and close association with petitioner (Tr. 560–567).

[5] See *State and Revolution* by Lenin, (Ex. 7, pages 19–20).

(Tr. 574–576). In September 1948, Clontz had received from the petitioner a carton of Communist literature (Tr. 562–563) and a letter in which the petitioner advised that he would be glad to discuss the Party's program with Clontz in person (Ex. 24). Petitioner thereupon furnished Clontz with a number of the Marxist-Leninist classics (Tr. 576–78) which outlined the basic aims and objectives of the Party (Tr. 581–83) and suggested that Clontz study them "to learn more about (the) Communist Party and to learn the principles of * * * Marxism-Leninism" (Tr. 583). At subsequent meetings with Clontz during 1949, petitioner continued to supply him with Communist literature and outlined the basic strategy of the Party for bringing about a violent revolution (Tr. 599–600).

In January 1950, petitioner informed Clontz that he was bringing Herbert Aptheker down from New York to address the Karl Marx Study Club (Tr. 613). Aptheker told the group that "a revolution in the United States was a certainty, and a necessity" and would be modeled on the "revolution that took place in Russia" (Tr. 617). Following the meeting, petitioner observed that Aptheker's speech was "one of the clearest statements of Marxist teachings that we would find" (Tr. 619). On January 17, 1950, Clontz, at petitioner's suggestion, became a member-at-large of the Communist Party (Tr. 620; Ex. 29). Pe-

titioner personally continued to tutor Clontz in the principles of Communism to help him "be a better member of the Communist Party" (Tr. 623). In this connection, petitioner gave Clontz a copy of Stalin's *Foundations of Leninism* (Ex. 51), and directed Clontz to use as a guide a study outline of the book which petitioner had personally prepared (Tr. 623; Ex. 30).

In June 1950, petitioner arranged for Clontz to enroll in the Communist Party's Jefferson School of Social Science in New York City (Tr. 650–51, 654; Ex. 33), where Clontz continued his education in Marxism-Leninism (Tr. 655), and upon his return discussed the teachings at the Jefferson School with the petitioner (Tr. 661).

In the latter part of 1951, petitioner advised Clontz that he was going "underground" (Tr. 703), but he continued to remain Chairman of the Carolina District of the Party.

Witness Childs[6] testified that petitioner had advised him that it would be necessary for the Red Army to "liberate" this country if, when the time for revolution arrived, the Communist Party was unprepared to cope with the situation (Tr. 1150, 1063).[7]

[6] Like Clontz, Childs entered the Communist Party for the purpose of acquiring information for the FBI. Childs established contact with the Party in 1948 (Tr. 1013). On December 18, 1949, Childs was introduced to petitioner Scales (Tr. 1019) and thereafter maintained an association with the petitioner until August 1953 (Tr. 1136).

[7] This conversation with petitioner apparently occurred during 1952 (See Tr. 1063–66). Earlier, during the Spring

During the Summer of 1952, Childs attended a Party school, organized and directed by petitioner (Tr. 1066–73). Childs was instructed by petitioner to bring with him certain literature and equipment (Ex. 42) and was introduced by petitioner to one "Abe," who was identified as a representative of the National Committee of the Communist Party (Tr. 1070). The school was held in a wooded area adjoining the farm of a Party member (Tr. 1070). Those in attendance were requested to adopt fictitious names because of reasons of "security" (Tr. 1072). It was pointed out to the students at the school that the works of Marx, Lenin and Stalin "are the basic theory upon which all final decisions (of the Party) are made" (Tr. 1101), and that although the Party "line" may change from time to time the ultimate purpose of the Communist Party, as embodied in the teachings of Marx, Lenin and Stalin, always remains the overthrow of the Government by force and violence (Tr. 1103–04).

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of 1950, petitioner had made a similar statement to the witness Clontz in discussing the subject of permanent revolution, which was defined by petitioner as the concept that the Communist Party in the Soviet Union has a continuing obligation under Stalin's teachings to continue assisting the Communist Parties all over the world until they had overthrown existing capitalist governments, including that of the United States (Tr. 645–46). Petitioner had stated, "as a practical matter that the Soviet Union would not land troops at the commencement of the revolution, that the Communists here would have to start the revolution themselves" (Tr. 646).

ARGUMENT

1. Petitioner attempts to ground his attack on the validity of the "membership" clause of the Smith Act (Pet. 8–12) upon this Court's ruling in *Dennis* v. *United States*, 341 U. S. 494. He construes *Dennis* to hold that imposition of the criminal sanctions under the Act is only justified where there is a showing that the defendant *advocated* or *conspired* to advocate the proscribed doctrine. And he urges that since, in his view, neither of these elements is present here, the "membership" clause fails to meet the test of constitutionality.

Such a narrow construction of *Dennis* is unwarranted. On the contrary, as the court below observed (App. to Pet. 31), the very factors which led to the *Dennis* holding on constitutionality impel the same result in this case. There, the crucial elements were (a) the defendants' knowledge of the unlawful objectives of the Communist Party, (b) their active participation in support and furtherance of those proscribed objectives, and (c) the role of the Communist Party in the world today. Each of those elements is clearly present here. The jury has found that petitioner definitely knew the Party's aim to overthrow the Government by force and violence; he furthered and supported that end by his continued active membership and leadership, particularly his efforts to recruit and indoctrinate

(see the Statement, *supra*, pp. 5, 6–9); and the place of the Communist Party in American and world affairs during the statutory period (Nov. 18, 1951–Nov. 18, 1954) was surely no less significant and no less dangerous than in *Dennis* or in *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909.

At least where, as in petitioner's case, the membership is active and not merely passive or nominal (cf. *Galvan* v. *Press*, 347 U. S. 522, 526–527), it does not seem a tenable argument that, although Congress may punish one who advocates the violent overthrow of the Government or who organizes a group which so advocates, it is without constitutional power to prohibit *membership* in such an organization with knowledge on the part of the member of this unlawful purpose, as well as the intent that it be brought about. Those who retain such active membership in an organization of this type "render [it] aid and encouragement" (*Frankfeld* v. *United States*, 198 F. 2d 679, 684 (C. A. 4), certiorari denied, 344 U. S. 922), contribute to its success, and thereby help it in the achievement of its subversive purpose. This is certainly "a sufficient evil for Congress to prevent". *Dennis* v. *United States*, *supra*, at 509.

Surprisingly, petitioner quarrels, to his own disadvantage, with this Court's holding in *Dennis* that Section 2 (a) (3) of the Smith Act, which embraces the "membership" clause, requires

proof that the accused intends to bring about the violent overthrow of the Government (Pet. 10).* He insists, however, that even if proof of intent be required, the clause cannot be saved since a state of mind comprising knowledge and intent, manfested by nothing more than non-conspiratorial membership, is insufficient to justify restriction of First Amendment rights (*ibid.*). But petitioner fails to recognise that "those who * * * combine for the purpose of advocating overthrow intend to bring about that overthrow." *Dennis* v. *United States, supra,* at 499. Similarly it is the *combining* with others in *active membership,* in an organization advocating the Government's forcible destruction, which constitutes the external manifestation of the illegal purpose here. Such active membership is as much an overt *act* as the "advocacy" which the Court in *Dennis* found sufficient to justify the imposition of the statute's criminal penalties. And in the face of these requirements of specific knowledge and specific intent, the argument that the accused may be convicted for innocent association (so-called "guilt by association") is plainly unsound.

2. As his second point, petitioner relies upon Section 4 (f) of the Internal Security Act of 1950 (50 U. S. C. 783 (f)) as modifying, amending, or repealing the "membership" clause of the

* "The structure and purpose of the statute demand the inclusion of intent as an element of the crime." *Dennis* v. *United States, supra,* at 490.

Smith Act so that it no longer applies to his case. We submit, however, that the Court of Appeals was correct in holding that Section 4 (f)* has no such effect.

First, the words of the pertinent provision of the Smith Act itself show that mere membership in the Communist Party alone does not constitute the offense. As petitioner concedes in his discussion of the sufficiency of the evidence (Pet. 18–20), the statute expressly sets forth, as an additional element, knowledge on the part of the defendant of the purposes of the society, group or assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence. Furthermore, the prosecution must allege and prove that the defendant intended to bring about the Government's violent overthrow as speedily as circumstances would permit. See *Dennis* v. *United States, supra,* at 499. Thus, petitioner has not been convicted on mere proof of Party membership *per se*. The conviction rests on much more—knowing, active, and purposive membership.

Secondly, it is clear, as the court below pointed out, that the "purpose of [Section 4 (f)] as defendant correctly argues," was to insure the enforceability of the registration provisions of the act [Internal Security Act of 1950] by mak-

* As he does also here.

ing the privilege against self-incrimination unavailable as a defense to failure to register" (App. to Pet. 36).[10] That the Congress intended to do no more than this is borne out by the legislative history [11] and by Section 17 of the Internal Security Act of 1950 (50 U. S. C. 796) which limits the application of Section 4 (f) to the provisions of that Act. It provides that—

> The foregoing provisions of this title shall be construed as being in addition to and *not in modification of existing criminal statutes.* [Emphasis added.]

Petitioner also urges that the Communist Control Act of 1954 must be construed to amend or repeal the "membership" clause of the Smith Act, thus barring his conviction. The 1954 Act contains no reference to the Smith Act, nor does its history indicate any purpose on the part of Congress that the later statute repeal, amend or qualify the Smith Act.[12]

3. Petitioner also contends that the evidence is insufficient to meet the requirements of the "clear and present danger" test and that, in any event,

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[10] The same conclusion was reached by the Court of Appeals for the Seventh Circuit in disposing of the same argument made in *United States* v. *Lightfoot* (C. A. 7), No. 11470, decided January 12, 1956, pending on petition for a writ of certiorari, No. 661, this Term.

[11] See 96 Cong. Rec. 14175, 15198.

[12] The legislative history reflects the opposite. See 100 Cong. Rec. 15102–15110, and particularly the remarks of Senators Humphrey and Kefauver at pages 15105 and 15106 respectively.

it does not support the verdict. The evidence, as our Statement reflects (*supra*, pp. 4–9) and petitioner does not seriously challenge, was abundant that the Communist Party, through the circulation of its revolutionary classics, by maintaining schools for the indoctrination of its members, and through other means, teaches and advocates the violent overthrow of this Government. And even a cursory examination of the testimony demonstrates that petitioner—the most important Party leader in North and South Carolina—was familiar with the Party's violent aims and purposes, whole-heartedly supported them, encouraged others to adopt them, and did all within his immediate power to accomplish them as soon as conditions and circumstances would permit. Fully as much as in the Smith Act "conspiracy" cases, the evidence amply supported the finding of the trial judge that there was a sufficient "clear and present danger" to warrant the application of the statute.

Petitioner's principal complaint appears to be that there was no evidence during the limitations period to justify the conclusion that he possessed the requisite knowledge and intent.[13] But the

[13] In this connection, petitioner suggests that the evidence introduced to establish his knowledge of the Party's illegal purposes, which pre-dates the limitations period, lacks all probative value. In response to a similar contention raised below, the court pointed out that the statements attributed to the petitioner, standing uncontradicted,

record is replete with references by the witness Childs to the revolutionary aims and purposes of the Party, petitioner's knowledge thereof, and his intent to accomplish those objectives. For instance, well within the limitations period is Childs' testimony that Scales had advised him that it would be necessary for the Red Army to "liberate" this country if, *when the time for revolution arrived,* the Communist Party was unprepared to cope with the situation (Tr. 1063, 1150). There is the witness' account of the teachings at a Party school, organized and directed by petitioner in the Summer of 1952, that the works of Marx, Lenin and Stalin "are the basic theory upon which all final decisions (of the Party) are made" (Tr. 1101), and that the ultimate purpose of the Party, as embodied in those teachings, always remains the overthrow of the Government by force and violence (Tr. 1103–04). There is also the statement of another member of the staff that "Socialism can be established only through the overthrow of the capitalists" (Tr. 1109), who, the students were told, "would not surrender peacefully" (Tr. 1115). And, again, the record reflects petitioner's direction to the witness to remain in industry where there were unions, "since

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"clearly established knowledge by defendant of the unlawful purposes of the party within the limitation period as well as prior thereto, since the running of the statute of limitations cannot empty a man's mind of knowledge of this sort" (App. to Pet. 41).

the Communist Party considered that trade unions are the schools of revolution" (Tr. 1062).[14]

4. No prejudicial errors were committed in the course of the proceedings leading to the indictment or at the trial.

(a). Petitioner's appeal to this Court to review the lower courts' rulings upholding the method of selection of the grand jury panel is lacking in merit because, first, petitioner waived his right to challenge the method of selection of the grand jury panel, and, second, the method of selection was in fact proper.

Petitioner was arrested on November 18, 1954, and after two extensions to secure counsel he pleaded not guilty to the indictment on December 16, 1954. At that time he reserved his right to file all pre-trial motions, specifically reserving his right to challenge the composition and array of the grand jury. On February 18, 1955, petitioner, represented by counsel of his own choosing, filed several motions requesting dismissal of the indictment on constitutional and other grounds, a bill

[14] Petitioner also seeks (Pet. 18, fn. 25) to cast doubt on the credibility of another of the Government's witnesses (Clontz). But this was clearly a matter for the jury's determination and is not open for review here. In the same category is the contention (Pet. 19–20) that the testimony of Lautner on the revolutionary aims and purposes of the Party was contradicted by published statements of Party officials (who did not testify at the trial). It was for the jury to determine, where the evidence was alleged to be contradictory, what testimony was to be believed and what was not.

of particulars, etc. These motions all were filed within the time prescribed by the court but after two continuances which were granted at the request of petitioner. It was not until shortly before the trial was scheduled to commence on April 11, 1955, that petitioner filed a motion attacking the method of selection of both the grand and petit jury panels. Reserving to the Government its objection as to the timeliness of petitioner's motion concerning the grand jury panel, the trial court conducted a hearing on the merits and, on April 1, 1955, dismissed the motions on the ground that the jury panels represented a fair cross-section of the community and also on the ground that the motion challenging the grand jury was untimely (Motion Tr. 153–154). *Agnew* v. *United States,* 165 U. S. 36; *Frazier* v. *United States,* 335 U. S. 497, 503.

On the question of the merits of the method of selection, the testimony at the hearing showed that the Clerk never intentionally or systematically excluded any class or group from jury service and that he tried to get a wide selection of jurors from all walks of life who were capable of serving (Motion Tr. 47–48). The Clerk and Jury Commissioner made special efforts to secure women and Negro jurors (Motion Tr. 25) and there was no exclusion whatever of minority political or racial groups (Motion Tr. 58). The practice of the Clerk and Jury Commissioner in sending form letters to various individuals and leaders of or-

ganizations asking for suggestions of names was not an unlawful delegation of their duties. *United States* v. *Dennis*, 183 F. 2d 201, 217–218 (C. A. 2); *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414, 419 (C. A. 3); *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8, certiorari denied, 303 U. S. 644.[15]

(b). Petitioner next contends that the Congressional findings contained in the Internal Security Act of 1950 and the Communist Control Act of 1954 necessarily deprived him of a fair and impartial trial because, in the face of this legislation, no jury could reach an independent and impartial verdict. If petitioner's contention were correct, all Communist Party leaders subject to prosecution under the Smith Act would be "immunized from prosecution in definitely." *United States* v. *Lightfoot* (C. A. 7), No. 11470, decided January 12, 1956 (pending on petition for a writ of certiorari, No. 661, this Term).

The fact is, as was observed by the court below, that petitioner "had a fair and impartial trial before an able and experienced trial judge" (App. to Pet. 45). The jury was as impartial as could

[15] Petitioner does not here challenge the composition of the petit jury. At the time of the trial court's denial of petitioner's motions attacking the grand and petit jury panels, the court observed that a revised list of prospective jurors was then being prepared by the jury officials (Motion Tr. 153–154). Petitioner's counsel agreed that the method of selection of the revised list of jurors was satisfactory to petitioner and met all his objections (Motion Tr. 154–164). The jury which tried this case was then chosen from the new panel of petit jurors selected under the revised method.

be secured: "the questions propounded by the judge to the trial jury on the voir dire were sufficient for the selection of an impartial jury and that was all that defendant had a right to ask" (App. to Pet. 43); see *supra*, pp. 18–19. See also *United States* v. *Dennis*, 183 F. 2d at p. 226, where the court stated that "those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who tried them may not be exempt from the general feelings prevalent in the society in which they live; we must do as best we can with the means we have."

(c). The trial court did not err in denying petitioner's requests to examine written reports made by prosecution witnesses Clontz and Childs to the Federal Bureau of Investigation. The initial motion, made prior to trial, for the production of such records under the provisions of Rule 17 (c), Federal Rules of Criminal Procedure, was a mere fishing expedition, not in any way sanctioned by this Court in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, upon which the petitioner relies (Pet. 23). The trial court plainly did not abuse its discretion in refusing to order such production.

During the course of cross-examination of Clontz and Childs, petitioner again moved for production of these documents. The cross-examination had elicited no information remotely suggesting that the reports contained any state-

ments contradictory to the direct testimony. Upon the Government's objection that therefore no foundation for production had been laid by petitioner, the court required the Government to produce the documents for inspection *in camera*. The court then determined that the reports were not of an exculpatory nature and were otherwise not relevant. In these circumstances, nothing in *Gordon* v. *United States*, 344 U. S. 414, 418–419—which squarely rested on the showing made there of contradiction as to "relevant, important and material matters which directly bore on the main issue being tried"—required that the reports be handed over to petitioner's counsel.[16]

As this Court held in *Goldman* v. *United States*, 316 U. S. 129, 132, a defendant is not entitled as a matter of right to inspect the memoranda of a witness where the witness does not use the memoranda in court, and the trial court's discretionary refusal of production cannot be overturned in the absence of a clear and prejudicial abuse of discretion. See also *Little* v. *United States*, 93 F. 2d 401 (C. A. 8), certiorari denied, 303 U. S. 644, and *Lennon* v. *United States*, 20 F. 2d 490 (C. A. 8); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234.

[16] See also *United States* v. *DeNormand*, 149 F. 2d 622 (C. A. 2); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2); *United States* v. *Simonds*, 148 F. 2d 177 (C. A. 2); *United States* v. *Cohen*, 148 F. 2d 94 (C. A. 2.

(d). Lastly, petitioner contends that there was error in the trial court's admission of evidence concerning the Communist Party's Negro policy, its attitude towards the Korean war, and the appearance of John Gates, editor of the "Daily Worker," at the University of North Carolina.

Evidence relating to each of these matters, however, was clearly admissible to establish petitioner's knowledge of the Party's teachings and program, or, as in the case of Gates, his support of national Party activities, and his personal activity in furtherance of Party policies. Moreover, none of this evidence was introduced *in vacuo*. For example, in the case of the Party's teachings on the right of self-determination of Negroes and the establishment of a separate Negro nation in the South, there was ample evidence to show that this is a basic part of the strategy and tactics of the proletarian revolution (Tr. 599–618).

In the same connection, petitioner also argues that it was error to admit testimony by Clontz and Lautner concerning acts and declarations of third persons outside the presence of petitioner. But this testimony, as the jury was told by the trial judge, was admitted on the issue of whether the Communist Party is an organization which teaches and advocates the violent overthrow of the Government. Proof of this fact was a necessary and material element of the prosecution's case in establishing an offense under the statute.

Thus, Lautner was properly permitted to testify as to the basic aims and objectives of the Communist Party as stated in official Party schools, conventions, and publications (Tr. 341, 342, 351, 354, 356, 358, 359) and to give his opinion, as a former high Party official, of the Party's application and understanding of certain principles of Marxism-Leninism (Tr. 358, 360, 439, 440). See *United States* v. *Lightfoot* (C. A. 7), No. 11470, decided January 12, 1956, pending on petition for a writ of certiorari, No. 661, this Term; *United States* v. *Flynn*, 216 F. 2d 354, 363 (C. A. 2), certiorari denied, 348 U. S. 909; *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C. A. 4), certiorari denied, 344 U. S. 922; *United States* v. *Mesarosh*, 223 F. 2d 449, 455 (C. A. 3), pending on writ of certiorari, No. 566, this Term; *Wellman* v. *United States*, 227 F. 2d 757 (C. A. 6), pending on petition for a writ of certiorari, No. 529 Misc., this Term — all permitting similar testimony from this witness.

The testimony of Clontz as to the teaching he received at the Jefferson School in New York was manifestly admissible as bearing directly upon petitioner's knowledge of the aims and purposes of the Party, particularly in the light of the witness' testimony that he reported to petitioner from his class notes the substance of what he had learned at that school (Tr. 661).

CONCLUSION

For the reasons set forth herein, we submit that the decision below is correct and need not be reviewed. We are aware, of course, that the Court has decided over the Government's opposition to review *Yates, et al.* v. *United States,* Nos. 308–310, this Term, and *Mesarosh, et al.* v. *United States,* No. 566, this Term, which involve conspiracy to violate the advocacy and organizing provisions of the Smith Act. However, this case involves the "membership" provision of the Smith Act, and the two circuits which have directly passed on the constitutionality and application of the "membership" clause have upheld them.[17] We are not certain of the factors which impelled the Court to agree to review the *Yates* and *Mesarosh* cases, and we believe that the instant case can stand independently of those two cases. But if the Court feels that the three cases are sufficiently interrelated to warrant the issuance of the writ here, we urge that in any event review be denied the trial issues embraced in the fourth

[17] The Fourth Circuit in the instant case, and the Seventh Circuit in *United States* v. *Lightfoot*, *supra.* See also *Frankfeld* v. *United States,* 198 F. 2d 679, 684, 690 (C. A. 4), certiorari denied, 344 U. S. 922, and *Dunne* v. *United States,* 138 F. 2d 137, 143 (C. A. 8), certiorari denied, 320 U. S. 790.

question petitioner seeks to bring here (Pet. 2) (discussed *supra*, at pp. 17–23).

Respectfully submitted.

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